Statement of T.J. Halstead
Legislative Attorney, American Law Division
Congressional Research Service

Before

The Committee on Rules,
United States House of Representatives

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on
"H.Res. 836 – Granting the Authority Provided Under Clause 4(c)(3) of Rule X of the House of Representatives to the Committee on Education and Labor for Purposes of its Investigation into the Deaths of 9 Individuals that Occurred at the Crandall Canyon Mine near Huntington, Utah"

Madam Chairman and Members of the Committee:

My name is T.J. Halstead. I am a Legislative Attorney with the American Law Division of the Congressional Research Service at the Library of Congress, and I thank you for inviting me to testify today regarding the Committee's consideration of H.Res. 836.[1]

H.Res. 836 would imbue the House Committee on Education and Labor with the authority to adopt a rule authorizing and regulating the taking of depositions by a Member or counsel of the Committee in furtherance of the Committee's investigation into the deaths of nine individuals that occurred in August 2007 at the Crandall Canyon Mine near Huntington, Utah. H.Res. 836 would authorize such depositions to be taken pursuant to a subpoena issued in accordance with the Rules of the House of Representatives, and would also authorize the Committee to provide that a deponent be directed to subscribe an oath or affirmation as administered by an authorized individual. The resolution under consideration would accomplish this by extending to the Committee by reference the authority that is currently exercised by the House Committee on Oversight and Government Reform pursuant to clause 4(c)(3) of rule X of the Rules of the House of Representatives.

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[1] H.Res. 836, 110th Cong., 1st Sess. (2007).

Generally speaking, a deposition is a pre-trial discovery device commonly used in litigation that typically involves the oral questioning of a witness (the deponent) by an attorney for one party, outside the courtroom, and out of public view. A deposition is taken following notice to the deponent, and is sometimes accompanied by a subpoena. The deposition testimony is given under oath or affirmation and a transcript is made and authenticated. While the mechanics of deposition practice are similar in the judicial and legislative spheres, the vesting of deposition authority in a Committee and its staff is best analyzed in relation to the exercise of oversight authority by Congress generally. While there is no definitive constitutional or statutory provision imbuing Congress with oversight authority, a long line of Supreme Court precedent establishes Congress' power to engage in oversight and investigation of any matter related to its legislative function.[2] Unless there is a countervailing constitutional privilege or a self-imposed statutory restriction upon its authority, Congress and its committees possess the essentially unfettered power to compel necessary information from executive agencies, private persons and organizations. Indeed, even though the Constitution does not contain any express provision authorizing Congress to conduct investigations and take testimony in support of its legislative functions, the Supreme Court has held conclusively that congressional investigatory power is so essential that it is implicit in the general vesting of legislative power in the Congress.[3]

In *Eastland v. United States Serviceman's Fund*, for instance, the Court stated that the "scope of its power of inquiry...is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[4] Also, in *Watkins v. United States,* the Court emphasized that the "power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes."[5]

Viewed in light of the expansive power possessed by Congress in the oversight context, there is no discernible basis upon which it may be argued that Congress lacks the ability to authorize the procurement of information through means short of a formal hearing, including through the conduct of a deposition.[6] Likewise, there would not appear to be any support for

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[2] For a thorough analysis of legal principles governing congressional oversight, *See* Morton Rosenberg, Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry, Congressional Research Service Report No. 95-464A, April 7, 1995.

[3] *E.g., McGrain v. Daugherty*, 272 U.S. 135 (1927); *Watkins v. United States*, 354 U.S. 178 (1957); *Barenblatt v. United States,* 360 U.S. 109 (1959); *Eastland v. United States Servicemen's Fund,* 421 U.S. 491 (1975); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *See also, United States v. A.T.T.,* 551 F.2d 384 (D.C. Cir. 1976) and 567 F.2d 1212 (D.C. Cir. 1977).

[4] 421 U.S. at 504, n. 15 (quoting *Barenblatt, supra,* 360 U.S. at 111).

[5] 354 U.S. at 187.

[6] The courts have upheld another alternative to a congressional hearing, statutes requiring the filing of information with administrative agencies, on the ground that they are an exercise of the legislative power to obtain information. See *Electric Bond & Share Co. v. SEC*, 303 U.S. 419 (1938)(upholding statutory provision requiring public utility holding companies to register with SEC); *United States v. Rappeport,* 36 F. Supp. 915 (S.D.N.Y.), *aff'd sub nom. United States v. Herling*, 120 F.2d 236 (2nd Cir. 1941). There is also specific statutory recognition of the use of depositions in congressional probes. In 1978, Congress granted the District Court for the District of Columbia original jurisdiction over civil actions brought by the Senate to enforce process issued by the Senate,

(continued...)

the proposition that the investigatory prerogatives of Congress do not extend to authorizing the conduct of such depositions by congressional staff.[7]

This conclusion is buttressed by the fact that deposition authority has factored prominently in an increasing number of significant congressional investigations over the last thirty years. One of the early investigations to make extensive use of this authority was the Senate's 1980 probe of the relationship between President Carter's brother, Billy Carter, and Libya, in which thirty-five depositions were taken.[8] Additionally, approximately 250 sworn depositions were taken by committee counsel and/or one or more Members of Congress under authority vested in the House and Senate committees that investigated the Iran-Contra affair.[9] Moreover, in a report accompanying a 1997 resolution granting deposition authority to the Committee on Government Reform and Oversight for purposes of its investigation of alleged political fund-raising improprieties, this Committee observed that the House had granted deposition authority in "at least 10 major investigations" since 1974.[10]

Regarding authorization for staff depositions, it is generally conceded that "committee staff may take depositions only if the committee is given that authority by its parent house."[11] Apart from the authorization extended to the House Committee on Oversight and Government Reform pursuant to clause 4(c)(3) of rule X, neither house of Congress has rules

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[6] (...continued)
including Senate subpoenas to respond to depositions. *See, e.g.,* 28 U.S.C. § 1365.

[7] In light of the fact that staff can conduct interviews (*see United States v. Weissman*, 1996 U.S. Dist. LEXIS 19125 (S.D.N.Y. Dec. 19, 1996)) and pose questions at hearings (see House Rule XI, cl. 2(j)(2)(C)), then it would seem that they can be permitted to take depositions. The Supreme Court has recognized, in a decision extending constitutional immunity under the speech or debate clause to congressional staff, that "the day-to-day work of such aides is so critical to Members' performance that *they must be treated as the latter's alter egos ....*" *Gravel v. United States,* 408 U.S. 606, 616-17 (1972)(emphasis added). The value of the information elicited at a deposition is not diminished by the fact that it is obtained by staff since, presumably, a transcript of the deposition will be available for Members of the committee to read. *Cf. Christoffel v. United States,* 338 U.S. 84, 91 (1949)(Jackson, J., dissenting).

[8] *See,* "Inquiry into the Matter of Billy Carter and Libya: Hearings before the Subcommittee to Investigate the Activities of Individuals Representing the Interests of Foreign Governments of the Senate Judiciary Committee," 96th Cong., 2nd Sess., Vol. III (App.) at 1741 (1980).

[9] S.Rept. 100-216, 100th Cong., 1st Sess. at xiv, 685 (1987).

[10] H.Rept. 105-139, 105th Cong., 1st Sess. 12 (1997).

[11] John C. Grabow, "Congressional Investigations: Law and Practice, § 3.3 (1988). It should be noted that both the Senate and the House have previously asserted that standing committees possessed the authority to conduct staff depositions in certain investigations despite the absence of an authorizing resolution. *See, e.g.,* S.Res. 495, § 3 96th Cong. (1980) (stating in a provision granting deposition authority that "this resolution shall supplement without limiting in any way *the existing authority of Senate committees and subcommittees to conduct examinations and depositions.*" (emphasis added)); *See also*, H.Rep. 104-472 at 12,104th Cong. (1996) (stating, with regard to a resolution granting staff deposition authority to the House Committee on Government Reform and Oversight, that nothing "shall be construed as undermining or reversing procedural precedents established in the course of past congressional investigations .... [T]he committee is aware that, in the past, sworn testimony has been taken from witnesses [at staff depositions] in the absence of a specific resolution authorizing the taking of such statements.").

that specifically authorize staff depositions. However, as noted above, such specific authority has been granted pursuant to Senate and House resolutions on a number of occasions. Such authority has likewise been extended, for instance, to the Senate Committee on Homeland Security and Governmental Affairs.[12] Numerous other examples of such authorizations may be found in a Congressional Research Service report entitled "Staff Depositions in Congressional Investigations."[13] When vested with such authority, a committee will normally adopt procedures for the taking of depositions, including provisions for notice (with or without a subpoena), transcription of the Deposition, the right to be accompanied by counsel, and the manner in which objections to questions are to be resolved. The House Committee on Oversight and Government Reform has adopted such procedures in relation to the authority extended to it by clause 4(c)(3) of rule X.[14]

From the above analysis, it is evident that there is ample precedent for the proposition that Congress may delegate deposition authority to its committees and staff. However, the Committee may wish to consider several factors, both legal and pragmatic, that adhere to the vesting of deposition authority in committees and staff. From one perspective, staff deposition may be seen as affording a number of significant advantages for committees engaged in complex investigations.

For instance, the imprimatur conveyed by such delegated authority may encourage a more rapid and robust response to general staff requests for information. Additionally, the actual conduct of such depositions may enable committee staff to obtain relevant information quickly and confidentially, without the necessity of Members devoting time to lengthy hearings that may be unproductive because witnesses do not have the facts needed by the committee, or refuse to cooperate. Depositions are conducted in private and may be more conducive to candid responses than would be the case at a public hearing.[15] Statements made by witnesses that might defame or even tend to incriminate third parties can be verified before they are repeated in an open hearing. Depositions can likewise prepare a committee for the questioning of witnesses at a formal hearing and may also serve as a screening mechanism to filter witnesses who do not possess pertinent information. The deposition process may also serve to obviate the time and resource constraints that impede full utilization of the formal hearing process, and enables the questioning of witnesses outside of Washington, D.C. This factor ameliorates the burden imposed by conducting field hearings that require the presence of Members, and may be of particular utility in the current scenario, given the logistical and investigative difficulties posed by conducting a traditional hearing-based congressional oversight inquiry into a mine disaster in Utah. Finally, the efficacy of the staff deposition process would appear to be enhanced by congressional action

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[12] *See* S.Res. 89, 110th Cong., 1st Sess. § 11(e)(3)(E) (2007).

[13] Jay R. Shampansky, "Staff Depositions in Congressional Investigations," Congressional Research Service, Report No. 95-949A (1999).

[14] *See* House Committee on Oversight and Government Reform, Committee Rules and Jurisdiction, Rule 22 (available at [http://oversight.house.gov/rules/]).

[15] Committee staff engaged in the taking of depositions may wish to consider the issues adhering to grants of immunity by Congress. *See* Frederick M. Kaiser, *et al*, "Congressional Oversight Manual," Congressional Research Service, Report No. RL30240 (2007).

emphasizing that criminal sanctions pertaining to the making of false statements apply during the taking of depositions.[16]

Conversely, it has been argued that staff depositions may "circumvent the traditional committee process" (*i.e.*, hearings and informal staff interviews) and, depending on the terms of the resolution authorizing such depositions and related committee procedural rules, compromise the rights of deponents and restrict the role of the minority in the investigative process.[17] Furthermore, to the extent that the current proposal contemplates inquiries "into the administration of relevant laws by government agencies, including the Department of Labor and the Mine Safety and Health Administration," executive agencies may raise legal, constitutional, and policy objections to the attendance of agency officials at staff depositions.[18] Finally, from a practical perspective, it might be argued that staff depositions present a "cold record" of witness testimony that might not be as useful to Members as in person investigations. The Congressional Research Service stands ready to assist the Committee in its consideration of any of the aforementioned issues.

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Madam Chairman, that concludes my prepared statement. I would be happy to answer any questions that you or other Members of the Committee might have, and I look forward to working with all Members and staff of the Committee on this issue in the future.

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[16] *See, e.g.,* 18 U.S.C. § 1001 and the False Statements Accountability Act of 1996, P.L. 104-292, where Congress acted in response to the Supreme Court's decision in *Hubbard v. United States*, 514 U.S. 695 (1995) (which held that 18 U.S.C. § 1001 applied only to false statements made in executive branch department and agency proceedings).

[17] H.Rept. 105-139, *supra* note 3, at 20-26 (minority views).

[18] *See* Shampansky, n.13, *supra*, at 2. Depending on the issues and personnel implicated, a host of issues ranging from executive privilege to separation of powers concerns might be raised. For example, the *Final Report of the Select Subcommittee to Investigate the U.S. Role in Iranian Arms Transfers to Croatia and Bosnia ("The Iranian Green Light Subcommittee")*, 104th Cong., 2nd Sess. 44-64 (1996)[hereinafter, *The Iranian Green Light Subcommittee Report*], illustrates the potential for such conflict in the staff deposition context. Agencies cooperated to some extent with the efforts of the Iranian Green Light Subcommittee to obtain deposition testimony. The Department of Defense made agency personnel (with the exception of the Secretary of Defense) available for subcommittee depositions (*id*. at 50) while the Department of State questioned the authority of the subcommittee to take depositions from "principals" (the Secretary, Deputy Secretary, and Undersecretary) (*id*. at 54). The White House asserted that the President's deliberative process (executive privilege) would be infringed by efforts of the subcommittee to obtain deposition testimony from senior National Security Council staff. *Id.* at 55-57. Executive privilege was asserted "on dozens of occasions in depositions" taken by the House Committee on Government Reform and Oversight in its investigation of the White House Travel Office firings and related matters. H.Rept. 104-849, 104th Cong., 2d Sess. 178 (1996). Compromise between the branches in a controversy over executive compliance with a congressional request for attendance at a staff deposition may be possible. Alternatives to a staff deposition may include an interview (distinguished from a deposition by the absence of an oath and a transcript) and a briefing of Members by senior executive branch officials. *The Iranian Green Light Subcommittee Report*, *supra*, at 55, 57.